

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER ROGERS,

Petitioner,

v.

PHILLIP KERNS,

Respondent.

CASE NO. 2:09-CV-243

JUDGE GREGORY L. FROST

MAGISTRATE JUDGE ABEL

OPINION AND ORDER

On October 13, 2010, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed, and that Petitioner's request for discovery, a stay of proceedings, and an evidentiary hearing be denied. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. Doc. 20. For the reasons that follow, Petitioner's objections (Doc. 20), are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner objects to each and every factual finding and legal conclusion reached by the Magistrate Judge. Specifically, he objects to the Magistrate Judge's recommendation of dismissal of claims three as procedurally defaulted due to Petitioner's failure to object at trial and the state appellate court's subsequent review of this claim for plain error only. Referring to the unpublished decision of *Knuckles v. Rogers*, 983 F.2d 1067 (6th Cir. 1993), he again argues that Ohio's plain error review does not constitute an adequate and independent state ground to preclude federal habeas corpus review. This argument is not persuasive. The United States Court of Appeals for the Sixth Circuit, in published decisions, has criticized the holding in *Knuckles*, stating "it is clear that

Knuckles. . . cannot provide persuasive authority” on this point. *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 424 (6th Cir. 2003)(quoting *Scott v. Mitchell*, 209 F.3d 854, 867 (6th Cir. 2000). As discussed by the Magistrate Judge, the United States Court of Appeals for the Sixth Circuit has rejected the arguments made by Petitioner herein, and this Court is bound by those decisions.

Petitioner objects to the Magistrate Judge’s recommendation of dismissal of claims four through six as procedurally defaulted. He again argues the ineffective assistance of appellate counsel constitutes cause for his failure to raise these claims on direct appeal; however, ineffective assistance of counsel cannot constitute cause for Petitioner’s procedural default because the state appellate court refused to consider the merits of that claim as untimely. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000).

Petitioner also objects to the Magistrate Judge’s recommendation of dismissal of claims one, two and seven on the merits. He again raises all of the same arguments he previously presented in regard to these claims. For the reasons detailed in the Magistrate Judge’s *Report and Recommendation*, this Court is not persuaded that these claims warrant relief.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the foregoing reasons and for reasons detailed in the Magistrate Judge’s *Report and Recommendation*, Petitioner’s objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
United States District Judge